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DUNWODY DISTINGUISHED LECTURE IN LAW

THIRTY-TWO YEARS ON THE FEDERAL BENCH: SOME THINGS I HAVE LEARNED

*Judge Emmett Ripley Cox**

Good Morning, I am honored to be here today. During my time on the court of appeals, I have had twelve law clerks who graduated from this law school; more than any other institution except for my own law school—the University of Alabama—from which I have had fourteen law clerks. My Florida clerks have gone on to enjoy successful careers. Two are on the federal bench—U.S. District Judge Mark Walker of Tallahassee and U.S. Magistrate Judge Patricia Barksdale of Jacksonville. And, in my time on the court of appeals, I have had the pleasure of serving with three judges who graduated from this law school: Judge Peter Fay, Judge Susan Black, and Judge Rosemary Barkett. Our court is a collegial court, and I have enjoyed the company of all of my colleagues.

I began my judicial career in 1981 as a district judge for the Southern District of Alabama, which is headquartered in Mobile, Alabama. Then, in 1988, President Ronald Reagan appointed me to the court of appeals, where I still serve in senior status. When a federal judge is eligible to retire, he may take what is called senior status. The statute governing senior status says that the judge may continue to perform such duties “as he is willing and able to undertake.”¹

I want to talk with you today about a few things I have learned from my experience as a trial judge and later as an appellate judge. Specifically, I will discuss how the proliferation of federal law—both criminal and civil—imposes a real burden on the federal courts. This proliferation has negatively affected pleading and pretrial procedures in the federal court system. And I will discuss what lawyers can do about these pleading and pretrial problems.

Over the course of my career I have seen drastic changes in litigation in the federal courts. Today, we often hear complaints about the high costs, inefficiency, abusive discovery, and complexity of litigation in the federal courts. It has not always been this way. These problems are not attributable to any one cause, but one of the most significant changes has been the expansion of both criminal law and civil law.

We can expect Congress to consistently do two things: One, some members will decry the intrusion of federal judges into the lives of our citizens. And two, Congress will increase the jurisdiction of the federal courts. It does so by enacting new criminal offenses and new statutory

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1. 28 U.S.C. § 294(b) (2006).

causes of action. In 2008, a Heritage Foundation study concluded that there were at least 4,450 federal crimes—with Congress creating over 500 new crimes every decade.² Over 40% of the federal criminal offenses enacted since the Civil War were enacted by 1970.³ A few years ago, the House Judiciary Committee asked the Congressional Research Service to recalculate how many federal crimes there were, but the Service responded that it lacked the manpower to accomplish the task.⁴ Arguably, no one really knows how many federal criminal offenses exist. The expansion of federal law is not only from statutes passed by Congress, but also from regulations produced by administrative agencies. In 1998, nearly 10,000 regulations included some type of sanction, with many being criminal sanctions.⁵ Judge Griffin Bell served on the Fifth Circuit and also served as Attorney General of the United States during the Carter administration. Judge Bell compared the Code of Federal Regulations to Roman Emperor Caligula's practice of having laws written in tiny script high on columns or walls where no one could read them.⁶ Caligula did this so he could selectively enforce the laws against whomever he chose.⁷ Judge Bell's comparison is probably accurate given that a printed copy of the Code occupies about thirty feet of shelf space. James Madison alluded to this problem, remarking in one of the *Federalist Papers*, "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."⁸

Civil caseloads too have expanded over time. In 1970, over 87,000 new civil cases were filed in the federal courts.⁹ In 2012, that number had grown to more than 278,000.¹⁰ For perspective, the civil caseload increased

2. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

3. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) [hereinafter FEDERALIZATION OF CRIMINAL LAW], available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf.

4. *Defining the Problem & Scope of Over-Criminalization & Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 65 (2013) (statement of F. James Sensenbrenner, Member, H. Comm. on the Judiciary), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81464/pdf/CHRG-113hhrg81464.pdf>.

5. FEDERALIZATION OF CRIMINAL LAW, *supra* note 3, at 10.

6. GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 17 (1982).

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *46.

8. THE FEDERALIST NO. 62 (James Madison).

9. *Compare Private Civil Cases*, FED. JUD. CENTER, http://www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil (last visited July 9, 2014), with *Civil Cases to Which the U.S. Was a Party*, FED. JUD. CENTER, http://www.fjc.gov/history/caseload.nsf/page/caseloads_civil_US (last visited July 9, 2014).

10. *Compare* sources cited *supra* note 9.

by 218% while the population only increased by approximately 53% over this same period.¹¹ Civil litigation has expanded in part due to the increase in complex statutory regimes. One recent example of a new statutory cause of action that is producing litigation in the federal courts is the Family and Medical Leave Act of 1993.¹² This Act grants employees the right to take unpaid leave under certain circumstances.¹³ This is a complex Act that is accompanied by some seventy-six regulations in the Code of Federal Regulations, all of which interpret and apply the Act.¹⁴ Today there are probably more statutory causes of action in the civil rights area alone than existed in the entire family of federal statutory causes of action when the Federal Rules were enacted.

This proliferation of civil causes of action and the federalization of crime imposes too great a burden on the federal courts. And there appears to be no reason to believe that this proliferation of federal law will not continue. The founders designed federal courts to be courts of limited jurisdiction. The goal was for the federal courts to be a scarce resource. As I will elaborate, the burden imposed by these caseloads makes it difficult for judges to actively manage and expedite litigation. The federalization of criminal law directly affects civil litigation by consuming much of a judge's time. Not only has the number of cases increased, but the complexity of cases has also increased due to complex civil statutory regimes with their attendant regulations. This greater complexity has made litigation more difficult both for judges and lawyers.

While it is easy to say that we have too much law, it is much harder to determine what should be done about it. After all, many of these laws protect important rights. But some of today's statutory causes of action and criminal offenses do not belong in the federal courts. Only Congress can solve this problem. Instead of attempting to tackle this problem, I will discuss how too much law has affected two important parts of litigation in the federal courts: pleading and pretrial. And, more importantly, I will explain how lawyers can use the existing Federal Rules to better manage litigation and improve efficiency in the federal courts.

I now turn to discuss the pleading stage of litigation. Eighty-six percent of the cases terminated in the federal district courts last year were

11. *Compare Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (last updated June 28, 2000) (estimating the U.S. population as of July 1, 1970 at 205,052,174), *with Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/state/totals/2012/tables/NST-EST2012-01.csv> (estimating the U.S. population as of July 1, 2012 at 313,914,040).

12. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

13. *See, e.g.*, 29 U.S.C. § 2612 (2006).

14. 29 C.F.R. §§ 825.100–.803 (2013).

terminated before a final pretrial.¹⁵ This means that a well-versed understanding of pleading tactics is essential to improve the efficiency of litigation. Due to the increased caseload, judges are less involved in the pleading stage of litigation. As a lawyer, I had some experience with pleading in the early 1960s. District judges generally were more likely to carefully review the plaintiff's complaint. On occasion a district judge would dismiss the plaintiff's complaint (just the complaint—not the action) for failure to state a claim if the complaint failed to allege even one element of the claim pled. But, in doing so, sometimes the court sua sponte granted the plaintiff leave to amend. And frequently the court's order dismissing the complaint told the plaintiff wherein the complaint was deficient. Generally, the result after amendment was a satisfactory statement of the claim.

Today's courts are less involved in the pleading process, and the burden falls more to lawyers to ensure that pleading moves along efficiently and to quickly remedy any errors in pleadings. The proliferation of federal law and complexity added by federal regulations has also complicated pleading by spawning longer, more verbose complaints that often obfuscate rather than provide clear notice of the claims in a lawsuit. To discuss these problems, I will first describe how to correctly and proficiently plead a case in a way that both provides notice of complex claims and minimizes delay. Second, I will analyze one of the big problems defense counsel may face in pleading: the problem of shotgun complaints. Finally, I will tell you how you can use the Federal Rules to combat these shotgun complaints.

The Federal Rules call for a type of pleading known as "notice pleading."¹⁶ While pleadings can become complex, the goal of this pleading system is to provide the defendant with notice of the claims presented by the plaintiff.¹⁷ The United States have not always used notice pleading. Originally, U.S. courts followed a pleading system called "form pleading."¹⁸ This pleading system required a plaintiff to follow certain forms for each different cause of action.¹⁹ The pleadings consisted of lengthy recitations that had to use specific wording.²⁰ Even the slightest variance from the proscribed form could be fatal.²¹

The Federal Rules, enacted in 1938, were a reaction against the

15. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2013 tbl. C-4 (2013), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C04Mar13.pdf>.

16. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

17. *Id.* at 512.

18. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437–38 (1986).

19. See *id.*

20. See *id.*

21. See *id.*

complexity and formality of form pleading.²² Instead of specific forms for each cause of action, the modern pleading standard embodied in Federal Rule of Civil Procedure 8 includes just three elements: (1) a short and plain statement of the court's jurisdiction; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought.²³ The simplicity these rules envision can be seen in the example complaint for negligent driving, included with the Federal Rules. It is only a short paragraph and substantively alleges little more than that "on <date>, at <place>, the defendant negligently drove a motor vehicle against the plaintiff."²⁴

Over time, this pleading standard has been refined and arguably expanded. The Supreme Court has recently focused on the portion of the rule stating that a complaint must "show[] that the pleader is entitled to relief." In *Bell Atlantic v. Twombly*, the Supreme Court held that a complaint must include "enough factual matter to suggest" that the elements of a claim are met.²⁵ The Supreme Court further explained that conclusory allegations are insufficient to meet this standard.²⁶ While this standard may require more factual allegations than some lawyers previously felt necessary, at the core it still focuses on the main goal of pleading: to provide notice to the defendant of the claims asserted. To put it simply, the relaxed requirements of notice pleading do not relax the requirement that a complaint must give the defendant fair notice of the nature of the case.

Now we can address how to correctly plead a case. Thankfully, this is neither a difficult nor time-consuming discussion. A complaint must begin with an allegation of jurisdiction. Surprisingly, a common error in complaints is a deficient allegation of jurisdiction. Because federal courts are courts of limited jurisdiction, these allegations are essential—without them the district court has no power to hear a case.²⁷ Most often, the problem lies with allegations of diversity jurisdiction. When pleading diversity jurisdiction, plaintiffs often erroneously allege that an individual is a resident of a certain state—not that the individual is a citizen of a certain state.²⁸ And, in cases involving corporations, plaintiffs often fail to properly allege both the state of incorporation and its principal place of business.²⁹ These defective allegations cause unnecessary delays. When we confront defective allegations on appeal, which we often do, it can take

22. *See id.* at 434, 439.

23. FED. R. CIV. P. 8.

24. FED. R. CIV. P. APP'X FORM 11.

25. 550 U.S. 544, 556–57 (2007).

26. *Id.* at 557.

27. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

28. *See* 28 U.S.C. § 1332(a) (2006).

29. *See id.* § 1332(c).

weeks for the court to issue an order identifying the jurisdictional problem, to wait for the parties to respond, and then to invite the parties to amend the complaint et cetera. Even worse are cases where the parties proceed through a full trial on the merits only to have the case dismissed on appeal for lack of federal jurisdiction.³⁰

Ultimately, most jurisdictional allegations in diversity cases should not be a difficult exercise. Civil Form 7 (which is attached to the Federal Rules) provides a fill-in-the-blank form for alleging diversity jurisdiction that is guaranteed to be correct.³¹ This is one case where boilerplate language is the way to go! Civil Form 7, however, does not tell you how to allege federal jurisdiction in diversity cases involving limited liability companies. An LLC, like a partnership, “is a citizen of any state of which a member of the company is a citizen.”³² Lawyers face a problem alleging jurisdiction in cases involving an LLC because the membership of the LLC is not generally available in public records.

After handling the jurisdictional allegations, we get to the “meat” of the complaint: the claim. How the claims should be alleged will vary greatly depending on the type of case. But, a good claim will always give notice of three different things. First, the complaint must provide notice of who is making a claim against whom. In modern multicclaim, multiparty actions, who is making each discrete claim and against whom it is asserted can be unclear. This is especially important when statutes or regulations govern what parties a claim may be brought against. Second, the complaint must provide notice of what events give rise to the claim. To paraphrase the Anglican confessional, claims originate in what the defendants did that they ought not to have done, or failed to do that they ought to have done. Uncertainty about such acts makes it impossible to identify the ultimate facts that would satisfy the elements of a cognizable claim. Third, a claim must give notice of its legal theory—the right statute or rule of liability that deems the plaintiff entitled to relief. This legal theory also identifies what factual allegations are sufficient to meet each element of the claim asserted. In a world where various facts may seem to give rise to a variety of claims, it is especially important for the plaintiff to identify the precise legal theory supporting relief.

Finally, a complaint must include a demand for relief. At its core, this is simply what the court should do if the plaintiff prevails in the case.

Now that I have talked about how to properly plead a case, it’s time to take a look at some of the most common problems today with pleading in

30. *Learning Connections, Inc. v. Kaufman, Englett & Lynd, PLLC*, No. 12-11716 (11th Cir. Dec. 4, 2013) (ordering limited remand for the purpose of determining whether diversity jurisdiction exists), *appeal dismissed as moot*, No. 12-11716 (11th Cir. Apr. 10, 2014).

31. FED. R. CIV. P. APP’X FORM 7.

32. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004).

the federal courts. With all the focus on “short and plain” statements and providing notice, one might assume that the main problem with complaints is that they are too short or that they fail to include enough information. To the contrary, today the main problem with complaints is that they are too long and provide too much irrelevant information while omitting the key information I just mentioned. These complaints fail to give notice because the relevant information is difficult to discern. Essentially, they create a legal version of “Where’s Waldo?”

In the Eleventh Circuit, many of these complaints are referred to as “shotgun complaints” because they allege a wide variety of facts instead of zeroing in on the claim. So-called shotgun complaints often contain three errors. First, shotgun complaints often contain extensive factual recitations but fail to specify which facts are relevant to the claim. These complaints often begin with pages of facts. Then, when the complaint attempts to assert a cause of action, each count adopts all of the previously stated facts as the supporting facts without identifying which facts are relevant to which claim.³³ Then each subsequent count also adopts the allegations from the preceding counts. Federal Rule 10(c) allows a plaintiff to reference facts mentioned in another part of a complaint instead of needlessly restating the same allegation.³⁴ But plaintiffs abuse Rule 10(c) by simply adopting all of the facts for each count. The result is a complaint that does not identify the specific facts that serve as the basis for the claim in each count. Rather, the defendant and the court are forced to sift through the irrelevant facts and attempt to determine which facts support each cause of action.

Second of the three errors, shotgun complaints often claim against a number of defendants and do not specify which defendant or defendants are alleged to be liable under each cause of action.³⁵ Instead, the complaints often allege that the “Defendants” collectively are liable under every count, even when it is readily apparent under some counts that not all of the defendants can be liable.³⁶ For example, in products liability cases, plaintiffs sometimes assert the claim against not only the manufacturer but also a litany of component manufacturers without alleging facts supporting a claim that the component manufacturers were at fault.³⁷ When a complaint targets several defendants, it sometimes fails to consider whether all the targeted defendants can be liable under the asserted claim. For example, public officials are often sued in both their individual and official capacities even when they cannot be individually liable on the

33. *Johnson Enter. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1333 (11th Cir. 1998).

34. *FED. R. CIV. P.* 10.

35. *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001).

36. *Id.*

37. WALTER K. OLSON, *THE LITIGATION EXPLOSION* 105.

claim. As a result of these tactics, defendants are left without notice of which claims actually apply to them.

Third of the three errors, shotgun complaints often contain a plethora of common law and statutory causes of action, each supported by a laundry list of legal theories.³⁸ While there is nothing wrong with asserting multiple causes of action, shotgun complaints often contain multiple theories of recovery in the same count. These complaints violate an admonition in Federal Rule 10(b) that each claim founded on a separate transaction or occurrence should be stated in a separate count if doing so would provide clarity.³⁹ By including multiple causes of action and legal theories for those causes of action in one count, these complaints often fail to clearly explain what theory creates liability.

When these three problems are added together, one is left with a complaint that doesn't specifically tell the defendants what claims are really being alleged, who they are being alleged against, or what facts provide the precise basis of the claims. To put it simply, the purpose of the complaint—to give notice—is lost.

We see on appeal a significant number of cases in which there is a shotgun complaint. Shotgun complaints create significant costs both for courts and parties. In the most extreme cases, shotgun pleadings inordinately distort cases and cause unnecessary litigation. For example, in one case, the failure of a shotgun complaint to identify the factual basis of a First Amendment claim prolonged the case through trial and multiple appeals. After the complaint was clarified, the claims were found to be meritless.⁴⁰ In the average case, the breadth of a shotgun complaint allows for unnecessary and uncontrolled discovery. As Eleventh Circuit precedent has explained, if a shotgun complaint is not quickly challenged, "extended and largely aimless discovery will commence, and the trial court will soon be drowned in an uncharted sea of depositions, interrogatories, and affidavits."⁴¹ Our court has in a few cases found it necessary to remand a case to the district court for repleading the claims.⁴² Even in the most modest cases, shotgun complaints force the court and the defendant to do the work the plaintiff neglected in framing claims—speculating how many claims there are, against whom they are probably brought, on what likely legal theories, and which facts in a rambling narrative actually matter. This wasted time is a drag on the judicial system that, as some judges have pointed out, may even imperil its essential function by inflating the costs of

38. *See* *Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996).

39. FED. R. CIV. P. 10(b).

40. *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1279 (11th Cir. 2000).

41. *Johnson Enter. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1333 (11th Cir. 1998).

42. *Magluta v. Samples*, 256 F.3d 1282, 1285 (11th Cir. 2001).

using the system.⁴³ At the end of the day, “[e]xperience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer justice.”⁴⁴

To be sure, shotgun pleading sounds bad, but the Federal Rules provide an effective weapon in Federal Rule 12(e) to combat bad pleading. While Rule 12(b)(6) allows motions to dismiss for failure to state a claim, the related Rule 12(e) motion allows one to move for a more definite statement. Rule 12(e) provides that

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired.⁴⁵

Rule 12(e) provides the remedy if the pleading fails in its essential purpose of putting the other party on notice of the claims to be litigated.⁴⁶ This Rule is a powerful tool to require clarifying pleadings, but parties seldom use it. Anecdotal evidence suggests that lawyers do not think the motion will be granted. While the propensity of an individual judge to grant or deny such motions may vary, the Eleventh Circuit has consistently encouraged litigants to use a 12(e) motion since the court’s beginning in 1981.⁴⁷ Indeed, the Eleventh Circuit has often bemoaned the failure of defense counsel to file a motion for a more definite statement prior to filing an answer. In *Davis v. Coca-Cola Bottling Co.*, the court noted, “What happened in this case was easily avoidable—by a straightforward application of the Rules of Civil Procedure. First, defense counsel, faced with a complaint purporting to combine in one count multiple claims of eight plaintiffs, should have moved the court for a more definite statement”⁴⁸ The Eleventh Circuit often comments on the need for Rule 12(e) motions. And apparently no published case has ever reversed a district court for granting a Rule 12(e) motion.

Some lawyers question whether a 12(e) motion is useful. Obviously, a Rule 12(e) motion forces the plaintiff to clarify the complaint by alleging specific facts supporting the asserted cause of action and identifying the

43. See, e.g., *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 983 (11th Cir. 2008).

44. *Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir. 1996).

45. FED. R. CIV. P. 12(e).

46. *Coca-Cola Bottling Co.*, 516 F.3d at 983–84.

47. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 998 (11th Cir. 1983).

48. *Coca-Cola Bottling Co.*, 516 F.3d at 983.

correct plaintiffs and defendants for each cause of action. This increased clarity provides several benefits. First, a 12(e) motion forces the plaintiff to limit the scope of the claim. Limiting claims in this manner allows a lawyer to better control the scope and cost of discovery. Second, a 12(e) motion also provides the defense with a better idea of the merits of the case. This knowledge is valuable. Third, a more concise case is helpful when moving for summary judgment. Not only does it allow the defense to determine when summary judgment might be appropriate, but it also ensures the summary judgment motion attacks a clear, discrete claim rather than an amorphous claim. You will recall that I previously noted that the vast majority of cases are disposed of during this stage of litigation and prior to any final pretrial order or pretrial document.

A Rule 12(e) motion may be not only beneficial but also necessary. A 12(e) motion may be necessary to lay the predicate for a 12(b)(6) motion to dismiss the complaint. The Eleventh Circuit has reversed the grant of a 12(b)(6) motion several times because the complaint was so ambiguous that the court could not determine whether it failed to state a claim.⁴⁹ In these cases the court noted that the correct course of action was to first bring a Rule 12(e) motion. Also, a Rule 12(e) motion may be necessary for a defendant seeking to assert a defense of absolute or qualified immunity. In some cases we have affirmed the denial of qualified immunity in cases where the complaint was so vague we could not determine whether a defendant was due qualified immunity.⁵⁰

Pleading is an area where lawyers can significantly affect the efficiency of the federal courts. We have now reviewed how pleading works in the courts, some problems you will face with pleading, and how to fix those problems.

I turn now to discuss the pretrial conference documents to the extent they may affect the pleadings. After pleading and discovery, a court will normally order a pretrial conference. Courts use the final pretrial process to narrow issues and create a plan for the trial. However, the pretrial process can also relate to the pleadings. Rule 16(c) lists the matters for consideration at any pretrial conference. Those that relate to pleadings say that the court may consider “formulating and simplifying the issues, and eliminating frivolous claims or defenses” or “amending the pleadings if necessary or desirable.”⁵¹ After the conference, Rule 16(e) of the Federal Rules of Civil Procedure permits the court to issue a final pretrial order

49. *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1280 (11th Cir. 2006); *Fikes v. City of Daphne*, 79 F.3d 1079, 1082–85 (11th Cir. 1996); *Quality Foods*, 711 F.2d at 998; *Barnett v. Bailey*, 956 F.2d 1036, 1043 (11th Cir. 1992).

50. *Anderson v. Dist. Bd. of Tr. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367–68 (11th Cir. 1996); see *Bennett v. Parker*, 898 F.2d 1530, 1537 (11th Cir. 1990) (Tjoflat, C.J., concurring) (discussing the problem in the Eleventh Circuit).

51. FED. R. CIV. P. 16(c)(2).

that controls the course of the action unless the court modifies it.⁵²

When I practiced law in the 1960s, pretrial conferences operated differently from today's practice. A final pretrial conference was held, and the judge dictated a final pretrial order that either referenced the complaint and answer or set out the legal and factual basis for the claims and defenses. At that time there were very few statutory causes of action, and trial judges were well-versed in most, if not all of them. The judge would draft a pretrial order that described the claims and defenses. Judges could use pretrial orders to clarify the case and limit the issues for trial. My view is that today it is not reasonable to expect a trial judge to be able to draft such an order in many kinds of cases. And most judges do not attempt to do so.

The Committee Notes to Rule 16(e) now tell us that “[m]any local rules make the plaintiff’s attorney responsible for drafting a proposed pretrial order.”⁵³ Most district judges in this circuit require the lawyers to prepare a pretrial order or document of some kind, which includes a summary of the legal basis and the factual basis for the plaintiff’s claims and the defendant’s affirmative defenses. Pretrial documents prepared by the lawyers often create serious problems. Rather than simplifying the issues, as the pretrial conference rule suggests, sometimes the issues are expanded to state a factual basis for claims that were never alleged in the plaintiff’s complaint. And, defenses never asserted in the answer to the complaint are sometimes included in the final pretrial document. So now we have a factual basis for claims and defenses not alleged in the pleadings. Under Rule 16(d) this pretrial document may now control the action. We often find that the lawyers defending the case fail to challenge this expansion of the claims. And the plaintiff’s lawyers fail to challenge this expansion of defenses. The result is that the pleadings have effectively been amended without leave of court. Today the pleading and pretrial rules just do not work the way they were designed to work.

I recall a case on appeal in which all of the claims pled in the complaint were breach of contract claims, but the pretrial document prepared by the lawyers added a statement that said something like “and the plaintiff asserts fraud.” Nothing else was said. A fraud claim was tried to a jury, which rendered a verdict for the plaintiff. The defendant appealed, contending that the evidence did not support the verdict. It was difficult, to say the least, for our court to decide what kind of fraud claim this was, and what were the elements of the claim. The fault for this problem lies first with the defendant’s lawyer, who apparently did not challenge this addition of a fraud claim in the pretrial document. Lawyers should be vigilant to carefully study these pretrial documents and should challenge an opponent’s expansion of the pleadings. One solution to this problem may

52. *Id.* 16(e).

53. *Id.* advisory committee note to 1983 amendment.

be to include in the pretrial document a statement to the effect that nothing in the pretrial document should be deemed to expand the legal or factual basis for claims and defenses alleged in the pleadings of the parties. In some pretrial orders or documents, however, there is an explicit statement that the order or document supersedes the pleadings. In any event a lawyer should challenge this expansion of the pleadings and call it to the court's attention. The district court should, when the matter is called to its attention, disallow what amounts to amendment of the pleadings by the pretrial document without leave of court.

After hearing this discussion, you may be wondering, who is to blame for these problems with pleading and pretrial documents? The truth is there is enough fault to go around. Plaintiffs' lawyers are at fault for drafting incomprehensible complaints. Defendants' lawyers are responsible for not challenging these complaints and often responding with deficient affirmative defenses. In pretrial documents, both parties are at fault for allowing the addition of new claims or new defenses. The district court is at fault for not more carefully policing these procedures and forcing parties to comply with the rules. And the court of appeals is at fault for tolerating poor pleading and poor pretrial documents; in many cases our court ignores them and says nothing about them. Today we have discussed how the expansion of criminal law, civil law, and administrative regulations has created an increased caseload in the federal courts. This increased caseload has altered the process of federal litigation—and not for the better. However, we have also discussed how lawyers can use the procedures in the Federal Rules for pleading and pretrial practice to better manage the difficulties posed by our new legal landscape and to improve the efficiency of the federal courts. Thank you for inviting me to come and speak to you.